

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

MASSACHUSETTS DEVELOPMENT )  
FINANCE AGENCY )  
Plaintiff, )

v. )

C.A. No. 04 CV 10203 PBS

ADP MARSHALL, INC., a FLUOR )  
DANIEL COMPANY, and FIREMAN'S )  
FUND INSURANCE COMPANY )  
Defendants. )

ADP MARSHALL, INC. )  
Plaintiff-in-Counterclaim, )

v. )

MASSACHUSETTS DEVELOPMENT )  
FINANCE AGENCY )  
Defendant-in-Counterclaim. )

ADP MARSHALL, INC. )  
Third Party Plaintiff, )

v. )

ALLIED CONSULTING ENGINEERING )  
SERVICES, INC., ANDOVER CONTROLS )  
CORPORATION, R&R WINDOW )  
CONTRACTORS, INC., and DELTA )  
KEYSPAN, INC. n/k/a DELTA )  
KEYSPAN, LLC )  
Third Party Defendants. )

**DEFENDANT ADP MARSHALL, INC.'S MEMORANDUM IN SUPPORT OF ITS  
MOTION FOR LEAVE TO FILE FIRST AMENDED THIRD PARTY COMPLAINT**

This memorandum is submitted in support of ADP Marshall, Inc.'s ("ADPM") Motion for Leave to File its First Amended Third Party Complaint. "A third-party claim may be asserted under [FRCP] 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant." FDIC v. Bathgate, 27 F.3d 850, 873 (3d Cir. 1994). As explained *infra*, the entities ADPM seeks to join to this proceeding as third party defendants are each potentially liable to the extent ADPM is liable to the Massachusetts Development Finance Agency ("MDFA") for the underlying complaint. Further, each of these subcontractors is secondarily liable to ADPM under their respective subcontracts to indemnify and defend ADPM with respect to claims made with respect to their performance.

The MDFA's complaint against ADPM alleges that there are "leaks" at the project for which ADPM is responsible. The MDFA has recently produced a copy of its experts' report which alleges caulking and design deficiencies throughout the project. Maddison Associates, R&R Window Contractors and Hartford Roofing Company each had caulking work pursuant to their respective subcontracts with ADPM. Further, since each of these three subcontractors was involved with creating a watertight building envelope (exterior metal wall panels, windows and roofing), there is clearly a relationship between the alleged leaks and their work. Spagnolo/Gisness Associates, Inc. provided architectural and design services as a sub-consultant to ADPM, which services have been called into question by the MDFA's complaint and expert report.

To date, Maddison Associates, R&R Window Contractors and Hartford Roofing Company have not accepted their obligations of indemnification and defense for the alleged claims resulting from their performance. If the allegations of the MDFA's complaint prove true,

Maddison Associates, R&R Window Contractors and Hartford Roofing may be in default of their respective subcontracts for failing to perform their work, and also for failing to indemnify and defend ADPM with respect to same. Maddison Associates, R&R Window Contractors and Hartford Roofing Company and their respective sureties are jointly and severally liable for any default under their respective subcontracts.

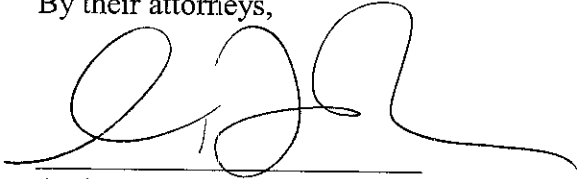
The MDFA has also alleged as part of its complaint that there are design and installation concerns with the HVAC system furnished by ADPM's subcontractors. The MDFA's expert report elaborates on these HVAC concerns. Allied Consulting designed the HVAC system which was installed by Delta Keyspan. Andover Controls handled the controls work for the HVAC system. Since each of these subcontractors was involved with the performance of the HVAC system, there is clearly a relationship between the MDFA's allegations and their work.

To date, Allied Consulting, Delta Keyspan and Andover Controls have not accepted their obligations of indemnification and defense for the alleged claims resulting from their performance. If the allegations of the MDFA's complaint prove true, Allied Consulting, Delta Keyspan and Andover Controls may be in default of their respective subcontracts for failing to perform their work, and also for failing to indemnify and defend ADPM with respect to same. Allied Consulting, Delta Keyspan and Andover Controls and their respective sureties are jointly and severally liable for any default under their respective subcontracts.

ADPM respectfully seeks leave pursuant to F.R.C.P. 14 to file and serve its First Amended Third Party Complaint.

Respectfully submitted,

DEFENDANT,  
ADP Marshall, Inc.,  
By their attorneys,

A handwritten signature in black ink, appearing to be 'Andrew J. Tine', written over a horizontal line.

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